No. 10998

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Appellants,

vs.

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

Rotary Colorprint, 661 Howard Street, San Francisco

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

EDWARD M. CONNELLY,

United States District Attorney
334 Federal Building
Spokane, Washington

Attorney for Appellant

JUSTIN C. MALONEY

311 Empire State Building
Spokane, Washington

Attorney for Appellee

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 404

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Plaintiff Alleges:

I.

That plaintiff is a resident of Spokane, Washington in the Eastern District of Washington, Northern Division. That plaintiff is the surviving wife of Dwight J. LaLone who died at Spokane, Washington on the 20th day of November, 1942. That on said date of death and for many years prior, plaintiff and said Dwight J. LaLone lived together as wife and husband. That as the issue of said marriage six children have been born and are now living, Jeanne A. LaLone, age 11 years. Julie S. LaLone, age 10 years, Janet D. LaLone, age 8 years, Jill R. LaLone, age 6 years, Lance D. LaLone, age 5 years and Thomas J. LaLone, age 1 year, the last of whom was born subsequent to the death of said Dwight J. LaLone. That all of said

children are under 18 years of age, are unmarried and have never been married, and on the 20th day of November, 1942 and during all of their lives prior thereto were dependent upon said Dwight J. LaLone, and ever since said date all of said children are and have been residing with and are and have been wholly dependent upon plaintiff.

II.

That on or about the 1st day of August, 1938 said decedent, Dwight J. LaLone entered the employ of F. S. Barrett & Co., a corporation, Spokane, Washington or Barrett-LaLone Insurance Agency, Spokane, Washington, [1*] as manager of the Insurance Agency at agreed monthly compensation of $200.00 per month plus automobile expense allowance. That said decedent remained in such employ until about the 1st day of May, 1942. That on or about the 1st day of May, 1942 said decedent entered the employ of Vermont Loan & Trust Company, a corporation, Spokane, Washington in charge of its insurance department and remained in said employment until the date of his death, November 20, 1942. That all such employment by said decedent constituted service by said decedent for his employers within the meaning of the Social Security Act of the United States.

III.

That subsequent to August 1, 1938 said decedent registered with the Social Security Board of the

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States as an employee and obtained his social security account number which is 539-16-1206. That said registration as an employee under the Act was made in person by said Dwight J. LaLone and was made under the direction of the duly authorized officer of his said employer.

IV.

That claims for said Child's Insurance Benefits have been duly made to said Social Security Board by the plaintiff herein in cases numbered 12-268, 12-269, 12-270 and 12-271 in behalf of said minor children and the claims have been disallowed by said Board.

Wherefore Plaintiff Prays for judgment that the decision of the Social Security Board in cases numbered 12-268, 12-269, 12-270 and 12-271 for Child's Insurance Benefits be reversed and for judgment directing the allowance of said claims by said Social Security Board and for such other relief as to the Court may seem proper.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed May 8, 1944. [2]

[Title of District Court and Cause.]

SUMMONS

To the Above Named Defendants:

You and each of you are hereby summoned and required to serve upon Justin C. Maloney, plain-

tiff's attorney, whose address is 311 Empire State Building, Spokane, Washington, an answer to the Complaint which is herewith served upon you, within 60 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] A. A. LaFRAMBOISE
Clerk of Court

Dated May 8, 1944.

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named The United States of America by handing to and leaving a true and correct copy thereof with Edward M. Connelly, the United States Attorney, for the Eastern District of Washington, at Spokane in said District on the 8th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By ELWYN L. DANIEL,
Deputy

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the thereinnamed The Social Security Board of The United States of America, by handing to and leaving a true and correct copy thereof with Arthur C. Kinnley, the Field Office Mgr. of the Social Security Board of Spokane, personally at Spokane in said District on the 11th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By ELWYN L. DANIEL,
Deputy [3]

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons and Complaint on the thereinnamed United States of America by depositing in the Post Office at Spokane, Wash. directed to said Attorney General of the United States of America at Washington, D. C. as registered mail, personally on the 8th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By R. R. ISAACS,
Deputy

[Endorsed]: Filed May 11, 1944.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Atty Gen
2 O. M. Bertrand

Date of delivery 5-13-1944

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 13th day of May, 1944, I received the within summons and served the defendant, The Social Security Board of the United States of America, by handing to and leaving a true and correct copy of the within summons together with a copy of the complaint in said case with Newton Montgomery, an attorney of the Social Security Board of the United States of America, personally at 1825 H Street NW in the City of Washington, District of Columbia, on the 13th day of May, 1944.

JOHN B. COLPOYS,
United States Marshal
By WILLIAM S. HENNESSY, Jr.
Deputy United States
Marshal

Marshal's Fees: Service $2.00.

[Endorsed]: Filed May 19, 1944. [4]

[Title of District Court and Cause.]

MOTION TO DISMISS ON BEHALF OF THE UNITED STATES OF AMERICA

Now comes the defendant, the United States of America, by Edward M. Connelly, United States Attorney for the Eastern District of Washington, and appearing herein specially for this motion and for no other purpose, and objecting to the jurisdiction of the court, moves the court to dismiss the action as to said defendant for want of jurisdiction, on the grounds

(a) That the United States has not consented to be sued for or in connection with benefits under Title II of the Social Security Act;

(b) That Section 205(g) of the Social Security Act as amended (Title 42, US.C. Section 405 (g)) provides an exclusive procedure for reviewing decisions of the Social Security Board by a civil action in which the said Social Security Board is the party defendant, and no decision of the Board may be reviewed except as therein provided (Section 205(h) of the Social Security Act as amended, Title 42, U.S.C. Section 405 (b)).

EDWARD M. CONNELLY
United States Attorney
Attorney for Defendant,
United States of America.

Service acknowledged by receipt of copy this 30th day of June, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed June 30, 1944. [5]

[Title of District Court and Cause.]

ANSWER

The defendant Social Security Board of the United States of America, an agency of the United States, answers the complaint herein as follows:

First Defense

1. Plaintiff has no claim upon which relief can be granted, as shown by the provisions of the Social Security Act as amended; the Regulations of the Social Security Board promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Social Security Board based thereon.

Second Defense

2. From August 1, 1938 to May 1, 1942, the decedent Dwight J. LaLone was in self-employment as a co-owner of and coadventurer in the Barrett-LaLone Insurance Agency, Spokane, Washington; his alleged compensation from the business did not constitute "wages" in "employment" within the definitions in Section 209 (a), (b) of the Social Security Act as amended (Title 42 U.S.C., Section

409 (a), (b)); nor did he render any services in employment. The facts as found by the Social Security Board so show; the findings are supported by substantial evidence and are conclusive.

3. The Social Security Board therefore found that in none of the fifteen calendar quarters from July 1, 1938 to March 31, 1942 did decedent Dwight J. LaLone receive $50 or more in wages so as to acquire a quarter of coverage (Section 209 (g) of the Social Security Act as amended, Title 42, U.S.C., Section 409 (g)). Since his services in the employ of the Vermont Loan & Trust Co. could account for only three quarters of coverage and since twenty-three quarters elapsed after 1936 and up to but excluding the quarter of death, the Social Security Board determined that decedent was not a fully insured individual who had the required eleven quarters of coverage.

4. By reason of the facts set forth in Paragraph 2 of this answer, the Social Security Board found that decedent was not paid wages of $50 or more for any of the ten calendar quarters between October 1, 1939 and March 31, 1942, which quarters are included within the twelve calendar quarters immediately preceding the quarter in which decedent died. It therefore determined that decedent had not been paid wages of $50 or more for each of not less than six [6] of such twelve calendar quarters and was not a currently insured individual (Section 209 (h) of the Social Security Act as amended, Title 42, U.S.C., Section 409 (h)).

5. The Board therefore properly decided that plaintiff's infant children were not entitled to child's insurance benefits (Section 202 (c) of the Social Security Act as amended, Title 42, U.S.C., Section 402(c)) as the children of a fully or currently insured individual.

Fourth Defense

6. Defendant admits the allegations of paragraphs I and IV of the complaint.

7. Answering paragraphs II and III of the complaint, defendant refers to the findings of fact of the Social Security Board contained in the transcript of the record filed herewith as a part of this answer as establishing the facts on which this action to review is based, and except as so established by said findings denies the allegations of said paragraphs of the complaint.

8. In accordance with the provisions of Title II, Section 205 (g) of the Social Security Act as amended (Title 42, U.S.C., Section 405 (g)) defendant files herewith as part of its answer a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with Section 205 (g) of the Social Security Act as amended, affirming the decision of the Social Security Board

complained of; and for such other relief as may be appropriate.

FRANCIS M. SHEA
Assistant Attorney General
EDWARD M. CONNELLY
United States Attorney
Attorneys for Defendant,
Social Security Board.

Service of this Answer is acknowledged by receipt of copy thereof July 3, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed July 3, 1944. [7]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, the Social Security Board, and respectfully moves this court for summary judgment in the above entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law; and for judgment in accordance with Section 205 (g) of the Social Security Act as amended (Title 42,

U.S.C., Section 405 (g)) affirming the decision of the Social Security Board herein complained of.

FRANCIS M. SHEA,
Assistant Attorney General
EDWARD M. CONNELLY,
United States Attorney
Attorneys for Defendant,
Social Security Board

NOTICE

Justin C. Maloney, Esquire
311 Empire State Building
Spokane, Washington

Please take notice that the points and authorities in support of the foregoing motion for summary judgment are hereto attached. The rules of the above-entitled court require that if you oppose the granting of this motion you shall, within the time required, or such time as the court may allow or the parties hereto agree upon, file in reply a memorandum of the points and authorities upon which you rely and serve a copy thereof upon the undersigned.

FRANCIS M. SHEA
Assistant Attorney General
EDWARD M. CONNELLY
United States Attorney
Attorneys for Defendant,
Social Security Board.

Served a true copy of the foregoing motion and notice and of the memorandum in support of de-

fendant's motion upon plaintiff's attorney by mailing a copy thereof in an envelop bearing Government frank and addressed to him at 311 Empire State Building, Spokane, Washington.

Service of the within notice, motion and memorandum is acknowledged by receipt of copies thereof July 3, 1944.

JUSTIN C. MALONEY,
Attorney for Plaintiff

[Endorsed]: Filed July 3, 1944. [8]

[Title of District Court and Cause.]

NOTICE OF AMENDMENT OF MOTION TO DISMISS ON BEHALF OF THE UNITED STATES OF AMERICA

To the Above Named Plaintiffs, and To Justin C. Maloney, Your Attorney of Record:

You and each of you will please take notice that a typographical error has been discovered in the original motion to dismiss on behalf of the United States of America, and the copy served upon you as follows: the last line of said motion wherein appear the words, "Section 405 (b)". The correct citation intended by the undersigned attorney for defendants, and the correct reading of said motion should be Section 405 (h).

You are further notified that at the time of argument of said motion, the undersigned attorney for the defendants will move the court for an order

permitting the amendment of said motion to dismiss on behalf of the United States of America as indicated herein.

EDWARD M. CONNELLY
Attorney for Defendants,
United States of America

Service of the foregoing Notice of Amendment of Motion to Dismiss on behalf of the United States of America, by receipt of copy thereof, is acknowledged this 28 day of August, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed Sept. 1, 1944. [9]

(Transcript of Proceedings on Hearings before Social Security Board submitted in accordance with the Stipulation as to Record on Appeal filed March 1, 1945,—in the form of a photostatic copy certified by the Chairman of the Appeals Council, Social Security Board.)

[Title of District Court and Cause.]

OPINION OF THE COURT

The defendants have moved for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. On December 7, 1942, plaintiff filed application under the

Social Security Act as amended (53 Stat. 1362, 42 U.S.C.A., Sections 401 et seq.) for child's insurance benefits (Section 202 (c) of the Act as amended, 42 U.S.C., Section 402 (c)) for four of her infant children, based upon the alleged status of her husband, Dwight J. LaLone, as an insured individual under the Act. He died on November 20, 1942.

On February 19, 1943, the Bureau of Old-Age and Survivors Insurance of the Social Security Board denied the application on the ground that the wage earner was not a fully or currently insured individual. Plaintiff disagreed with the determinations. She requested [11] and was given a hearing before a referee of the Social Security Board. The referee held that the wage earner was not a fully or currently insured individual for the reason that he was not an employee within the contemplation of the statute for a sufficient period prior to his death.

Thereupon plaintiff appealed to the Appeals Council of the Social Security Board which affirmed the referee on March 11, 1944, and adopted his findings of fact and statement of reasons. Under the practice of the Social Security Board this became the final decision of the Board. Plaintiff then brought this action to review the denial of her claims on behalf of her children, pursuant to the jurisdiction conferred by Section 205 (g) of the Social Security Act.

Section 205 (g) (Title 42, U.S.C., Section 405 (g), the jurisdictional provision of the Act which

authorizes the action to review the administrative decision, provides that "As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based." This has been done.

The applicable statute provides in part as follows: "Any individual * * * may obtain a review of such decision by a civil action commenced within sixty days * * *. Such action shall be brought in the District Court of the United States for the judicial district in which the plaintiff resides * * *. The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, * * *." 42 U.S.C.A. 405 (g).

Section 209 (a) of the Social Security Act as amended (Title 42, U.S.C., Section 409 (a) provides that "The term 'wages' means all remuneration for employment * * *." Section 209 (b) of the Social Security Act as amended (Title 42, U.S.C., Section 409 (b)) defines [12] employment as "any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in Section 210 (b) of the Social Security Act prior to January 1, 1940 * * *," and with exceptions not here pertinent, "any service of whatever nature, performed after December 31, 1939, by an employee for the person employing him

* * *." Section 210 (b) of the Social Security Act in effect prior to January 1, 1940, (49 Stat. 625) defines "employment" to mean, with exceptions not here pertinent, "any service of whatever nature performed within the United States by an employee for his employer." The pertinent regulations are found in the footnote.[1]

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[1] Regulations 90 and 91 relating to the definitions of employment are as follows: "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control of direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a part-

At the threshold of the case, I am met with defendant's contention that the order of the Social Security Board is conclusive and binding upon this Court. I give full recognition to the principle that resolving the question of the status of the wage earner belongs to the usual administrative routine of the Board. Gray v. Powell, 314 U.S. 402, 411. Unquestionably the Board's determination is to be accepted if it has warrant in the record and a reasonable basis in law. National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 131. However, if the applicable statute and regulations properly interpreted forbid the method of analysis of the testimony followed by the Board, the Board's decision "would not be in accordance with law and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts." Dobson v. Commissioner, 320 U.S. 489, 492. After a careful review of the record in this case and a study of the referee's decision, I am convinced that the referee reached his conclusion without regard to the statute or regulations and that his determination has no reasonable basis in law and that his factual analysis has no warrant in the records.

First: A careful study of the referee's decision

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ner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists."

can bring one to no other conclusion than that he totally ignored the applicable regulation. He concluded that LaLone was a partner or joint adventurer in the insurance business. He emphasized the importance of statements LaLone made in which he referred to himself as a partner. At no place in his decision did the referee refer to that portion of the regulation reading: "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor." [14] He gave no consideration to the testimony that the two Barretts had the right to control and direct the methods of operation, but stressed the testimony that such direction and control was infrequent. In this, the referee ignored the provision in the regulation reading: "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has a right to do so." At no place in his decision did the referee discuss the testimony submitted as to the right of the Barretts to terminate the relationship on their own volition. In this the referee ignored the provision of the regulation reading: "The right to discharge is also an important factor indicating that the person possessing that right is an employer." The referee gave no

weight to the testimony showing that the Barretts furnished the office space out of which LaLone worked. In doing this, the referee disregarded that portion of the regulation reading: "Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the services." This interpretative regulation represents a "contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new," and is entitled to great weight. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315; United States v. American Trucking Associations, Inc., 310 U. S. 534, 549; White v. Winchester Country Club, 315 U. S. 32, 41. Certainly the referee had no right to ignore that which the courts are commanded to respect.

Second: The referee's approach to the problem here involved completely ignored the broad aspects of the statute with the administration of which this agency is charged. The Social Security Act was passed to meet the challenge of the great economic and social problems which confronted the Nation as an outgrowth of the evils of unemployment, old-age penury and juvenile dependency. The best statement of [15] its objectives can be found in the testimony of Senator Wagner, the sponsor of the legislation, before the Senate Committee on Finance on January 22, 1935. (See: Hearings, Economic Security Act, United States Senate Committee on

Finance, 74th Cong. 1st Session, S. 1130, p. 2). Whether an individual comes within the classification of "employee" must be answered from the history, terms and purposes of the legislation. The word is not treated by Congress as a word of art, as having a definite meaning. Rather, it takes color from its surroundings in the statute where it appears. United States vs. American Trucking Associations, Inc., 310 U.S. 534, 545. The word derives meaning from the context of that statute which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co., v. Bassett, 309 U. S. 251, 259. The Ways and Means Committee of the House of Representatives clearly demonstrated its purpose to cause a liberal interpretation of the word by this language, in its Report of June 6, 1939. (See: House Report No. 728, 76th Cong., 1st Session, Congressional Record, v. 84, pt. 6, p. 6711, et seq.): "The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards." Later, in the same Report (see, p. 6729) that Committee said: "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationships laid down in cases relating to tort liability and to the common-law concept of master and servant should not be nar-

rowly applied." The defendants place great emphasis upon a statistical showing of the percentage of workers within the country not covered by the Act (Report, Social Security Board, 1943, p. 14). The restriction upon the coverage does not stem from the language Congress used in defining "employer," "employee," or "employment." It is the result of fifteen [16] restrictive exceptions withholding from coverage certain specified classes of workers. I am not entirely unfamiliar with the legislative background of this statute. A review of its legislative history must convince one that the restriction of the coverage was effectuated by opponents to the legislation unwilling to oppose its general purposes and forced to a program of legislative attrition by the means of restrictive amendments.

The referee, in analyzing the facts of this case, indisputably demonstrates his belief that such facts should be analyzed upon the basis of the common-law concept to the end that the employer-employee relationship should, if possible, be avoided. In so doing, he ran directly contrary to the command of the Supreme Court when, in discussing the National Labor Relations Act, it delineated the steps to be taken in determining the existence or non-existence of the employer-employee relationship. National Labor Relations Board v. Hearst Publications, supra. The language there used is applicable here. "Congress, on the one hand, was not thinking solely of the immediate technical relation of

employer and employee. * * * Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common-law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

"It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes. [17]

"Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective, * * * Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are 'employees' within

the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives. Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law."

The Circuit Court of Appeals for the Sixth Circuit had for decision a question of employer-employee relationship under the Fair Labor Standards Act. In its interpretation, it laid down this standard: "We are dealing, however with a specific statute which, like the National Labor Relations Act, 29 U.S.C.A. 151, is of a "class of regulatory statutes designed to implement a public, social, or economic policy through remedies not only unknown to the common-law but often in derogation of it. * * * If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common-law." Walling v. American Needlecrafts, 139 F. (2d) 60, 63.

The Circuit Court of Appeals for the Fourth Circuit had this statute before it for interpretation.

United States of America v. The Vogue, inc., decided November 13, 1944. That court, speaking [18] through Judge Parker, said: "The Social Security Act, like the Fair Labor Standards Act, and the National Labor Relations Act, was enacted pursuant to a public policy unknown to the common-law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common-law rules worked out for determining tort liability * * *. Whatever conclusion might be drawn, however, as to whether Mrs. Fulton and Mrs. Woodfin were or were not independent contractors under the rules of the common-law as applied in the several states, we think there can be no question that they and their assistants should be held to be employees of plaintiff within the meaning of the Social Security Act as amended. 26 U. S. C. A. 1400, 1410. The purpose of that act was to provide old age, unemployment and disability insurance. * * *.

The inhospitable scope with which the referee viewed the statutory definition of "employee" is well demonstrated in the emphasis placed by him upon an unsigned written proposal proferred to La Lone by the Barretts.[2] As to this feature, I must

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[2] The extent to which the courts frown upon such an attitude of viewing a statute was best described by Mr. Justice Holmes, on Circuit, when he wrote in Johnson v. United States, 163 F. 30, 32: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall

confess that I [19] am handicapped by the awkward handling of the facts by the referee in his decision. The courts do not expect of an administrative agency that exactness or nicety which the appellate courts require of us inferior judges in distinguishing between findings of fact and conclusions of law. Nonetheless, it does not seem unreasonable to me to suggest that judicial review cannot be nullified by a confused mixture of findings, inferences and conclusions in the referee's decision. Beaumont, Sour Lake & Western Railway Company v. United States, 282 U. S. 74, 86; Florida v. United States, 282 U. S. 194, 215; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 488; United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294, U. S. 499, 510; Eastern-Central Motor Carriers Associa-

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be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See, also, Frankfurter, J., in Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391, and United States v. Hutcheson, 312 U. S. 219, 235; Taft, C. J., in United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 385-389; Sutherland, J., in Funk v. United States, 290 U. S. 371, 381; Cardozo, J., in Van Beeck v. Sabine Towing Co., 300 U. S. 342, 350-351; Lord Birkenhead, L. C., in Bourne v. Keane (1919) A. C. 815, 830; Stone, The Common Law in the United States (1936) 50 Harv. L. Rev. 4, 13; Landis, Statutes and the Sources of Law, Harvard Legal Essays, p. 213.

tion v. United States, 321 U. S. 194, 212. This unsigned proposal was received in evidence and discussed in detail by the referee. I give full recognition to the principle that administrative agencies usually are not restricted to the same rules of evidence as apply in court proceedings and that the Board is permitted to consider that which would be objectionable in a court of law if it is of a kind on which fair-minded men are accustomed to rely in serious matters. Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 155; National Labor Relations Board v. Remington Rand, 94 F. (2d) 862, 873; Ellers v. Railroad Retirement Board, 132 F. (2d) 636, 639. However, here was a piece of evidence as to a mere offer to contract upon which clearly there was no meeting of the minds. The referee recognized this and, at one point, he indicated his intention to disregard it. Yet it is clear, from the reading of his decision, that the unsigned proposal was of controlling influence and weight with him. It is true that the witness Barrett testified that he thought the proposed writing stated his understanding with LaLone; yet the remainder of his testimony conclusively negatives such a conclusion by him. The [20] agreement was unsigned; its terms were disregarded; there was no justification for the referee emphasizing its importance as he did in reaching his conclusions. Undoubtedly, the referee properly received the proposed contract. I refer to the emphasis placed by him on it merely to indicate the restricted field of vision with which he approached the problem.

In my opinion, the testimony submitted here establishes an employer-employee relationship not unfamiliar to those who have had some practical business experience. F. S. Barrett and his son had been in the real estate business in Spokane for many years. As a young man LaLone went to work for them selling insurance. Under their direction and supervision, he was so successful that a local bank made him an offer of a position as manager of its insurance department. He left the Barretts under most friendly circumstances. Upon the failure of the bank, LaLone purchased the insurance business of the bank and started out on his own. Like so many men with sales ability, LaLone failed when faced with the responsibility of management. By 1938, his business reached a point where he owed substantial sums of money to the companies he represented for commissions he had collected. He faced serious consequences unless such commissions could be paid. In his decision, the referee stresses the value of LaLone's insurance assets. To the uninitiated, such insurance accounts might seem valuable. With commendable modesty the referee admitted his unfamiliarity with the insurance business. The fact is that there is nothing less valuable than the insurance accounts of an agent who becomes delinquent with the companies he represents. He not only loses the right of representation of those particular companies, but he loses the opportunity of representation of any other companies. What he has is worthless. This was the situation confronting LaLone in 1938. Then he went back to his old em-

ployers, the Barretts. They were willing to assist their former employee. They advanced the necessary funds with which he could make up his delinquencies. They took his notes for such amounts. They acquired the [21] right to enforce the payment of those notes by discontinuing the relationship that was established. He went to work for $200 a month. It is true that he hoped, as did the Barretts, that an insurance partnership later could be evolved. What he had at the time and during the entire time he was working there was simply a provisional arrangement whereby he could become a partner upon the success of the enterprise. The Barretts furnished the place at which the business was transacted; LaLone adjusted his working hours to comply with the office hours of the Barretts. The Barretts decided on the important questions of policy and had the right to decide on all questions of policy. It is true that they used the name Barrett-LaLone Insurance Agency. That, however, was simply a business device intended for the purpose of developing and retaining any business that might be secured. It is true LaLone had the right to sign checks along with Mr. Barrett. That is no proof of a partnership relationship. Many employees are given the dubious honor of signing checks without any proprietary interest in the business. The referee made much of the fact that, without the Barretts' consent, LaLone sold his insurance accounts to the Vermont Loan and Trust Company in 1942, and paid back to the Barretts the amount of money they

had loaned to him. I can readily understand how anyone inexperienced in business practices would construe this to mean that at all times LaLone maintained a proprietary interest in his business and was working for himself. Actually, all he had was the right to recapture these accounts if they became valuable and he could secure a sum sufficient to pay off his debt. This case presents an excellent illustration of what was discussed by Judge Parker in an address before the section on Patent, Trademark and Copyright Law of the American Bar Association (American Bar Association Journal, v. 30, p. 623). Judge Parker was there discussing the proposed creation of a patent court. He said: "What is needed there is not so much a court of experts, as a court of wide experience and sound common sense. Everybody knows that the training [22] which makes a man an expert necessarily narrows his field of vision and renders him impractical in matters outside his specialty. * * * What is needed is not the bookish approach of the scientist to the problem but the common sense approach of a court accustomed to deal with all sorts of human relationships." There was nothing unusual or uncommon about this relationship between the Barretts and LaLone. He had worked there before. When he got into financial difficulties, they were willing to help him out. Of course, they permitted him to make a deal whereby he could better his situation. That did not mean that he had been in partnership with them in an insurance agency. As long as he was there, he was simply working there. LaLone

had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debts and would have discharged him. They controlled and directed his activities; they furnished him a place to work; he worked on a definite salary which he drew regardless of profits. Situations such as this are a matter of daily occurrence in the business world. It would require the most tortuous interpretation of the statute and regulation to conclude other than that LaLone was an employee. He had the right to hope that, if the business succeeded, the relationship would ripen into a partnership or joint adventure. That time never came while he was working there.

The motion for summary judgment must be denied.

L. B. SCHWELLENBACH
United States District Judge

November 27, 1944.

[Endorsed]: Filed Nov. 27, 1944. [23]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff above named and respectfully moves the Court for summary judgment in the above entitled action pursuant to rule 56 of the Federal Rules of Civil Procedure in her favor; and for judgment in accordance with Section 205 (g) of the Social Security Act as amended (Title 42,

U.S.C.A. Section 405 (g)) reversing the decision of the Social Security Board herein complained of.

This motion is based on the records, files and proceedings herein, the pleadings of the parties and the certified copy of the transcript of the record including the evidence on file herein.

JUSTIN C. MALONEY
Attorney for Plaintiff.

Copy received December 5, 1944.
EDWARD M. CONNELLY

[Endorsed]: Filed Dec. 5, 1944. [24]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 404

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE, and LANCE D. LaLONE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

The above entitled matter having come regularly on for hearing and determination before the Court

the plaintiff appearing by her attorney, Justin C. Maloney, and the defendants appearing by Edward M. Connelly, United States Attorney, and the pleadings of the parties being on file herein, and the defendant, The Social Security Board of The United States of America having filed as part of its answer herein a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of herein are based, and both plaintiff and defendants having moved for summary judgment in their respective favor, and the Court having heard the argument of counsel, and briefs and memorandums of authorities having been submitted to and considered by the Court and the Court having fully considered the matter and being fully advised in the premises and having filed herein the written opinion of the Court, It Is Hereby

Ordered, Adjudged and Decreed that the motion for summary judgment of the defendants in their favor be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion for summary judgment of the plaintiff in her favor be and the same is hereby granted.

It Is Further Ordered, Adjudged and Decreed that the decision of the Social Security Board of the United States of America in the cases of Augusta J. LaLone on behalf of Julie S. LaLone, Case No. 12-268, Janet D. LaLone, case No. 12-269, Jill R. LaLone, case No. 12-270, Lance D. LaLone, case No. 12-271, for Child's Insurance Benefits, he and the same are hereby reversed. And the defendant. The Social Security Board of The United States of

America be and it is hereby directed to certify to the Managing Trustee the names and addresses of the parties plaintiff herein as entitled to receive Child's Insurance Benefits as provided by law and the order of this Court.

Done in open court this 22nd day of December, 1944.

L. B. SCHWELLENBACH
Judge.

Copy Received 12/22/44.
EDWARD M. CONNELLY
U. S. Atty.

Presented by:
JUSTIN C. MALONEY

[Endorsed]: Filed Dec. 22, 1944. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and The Social Security Board of the United States of America, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final Judgment which was entered in this action on December 22, 1944.

Dated this 21st day of February, 1945.
EDWARD M. CONNELLY
United States Attorney for the Eastern District of Washington, Attorney for Appellants.

Copy of the above Notice of Appeal mailed to Justin C. Maloney, Attorney for Plaintiff, this 21st day of February, 1945.

EVA M. HARDIN,
Deputy Clerk.

[Endorsed]: Filed Feb. 21, 1945. [26]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON WHICH APPELLANTS INTEND TO RELY UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Come Now the appellants by their attorney, Edward M. Connelly, the duly appointed, qualified and acting United States Attorney for the Eastern District of Washington, and make the following statement of the points on which they intend to rely on the appeal:

I.

The District Court erred in failing to hold that the Social Security Board's findings that decedent Dwight J. LaLone was self-employed and a joint-venturer in the insurance business were supported by substantial evidence and conclusive.

II.

The District Court erred in holding that the Social Security Board had applied an improper rule of law, had failed to follow National Labor Relations

Board v. Hearst Publications, Inc., 322 U.S. 111, and had ignored the applicable regulation in determining said deceased individual's employment status for Social Security purposes.

III.

The District Court erred in failing to give due weight to the evidence supporting the Social Security Board's findings, but instead, selecting evidence tending to support other findings and conclusions.

IV.

The District Court erred in entering judgment for plaintiff.

Dated this 21st day of February, 1945.

EDWARD M. CONNELLY

United States Attorney for the Eastern District of Washington, Attorney for Appellants.

Service of the foregoing Statement of Points upon which Appellants intend to rely upon Appeal is admitted by receipt of copy thereof this 21st day of February, 1945.

JUSTIN C. MALONEY

Attorney for Augusta J. LaLone, Julie S. LaLone and Lance D. LaLone, Plaintiffs and Appellees.

[Endorsed]: Filed Feb. 21, 1945. [27]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

Comes now the parties above named, Augusta J. LaLone, on behalf of Julie S. LaLone, Janet D. LaLone, Jill R. LaLone and Lance D. LaLone, plaintiff and appellee in the above-entitled proceeding, by his attorney Justin C. Maloney, Esquire, and the United States of America and the Social Security Board of the United States of America, defendants and appellants, by their attorney, Edward M. Connelly, United States Attorney for the Eastern District of Washington, and hereby agree and stipulate that the following parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal, to-wit:

1. Transcript of proceedings on hearing before the Social Security Board of the United States of America and titled as follows: "Federal Security Agency, Social Security Board, Office of Appeals Council.."

DECISION OF APPEALS COUNCIL

In the cases of Augusta J. LaLone on behalf of

	Case No.	Claim For:
Julie S. Lalone (Claimant)	12-268	Child's Insurance Benefits
Janet D. LaLone (Claimant)	12-269	Child's Insurance Benefits
Jill R. LaLone (Claimant)	12-270	Child's Insurance Benefits
Lance D. LaLone (Claimant)	12-271	Child's Insurance Benefits

Dwight J. LaLone
(Wage Earner)
(Social Security Account No. 539-16-1206)

which said transcript constitutes the basis of appeal from the appeal council of the Social Security Board to the United States District Court for the Eastern District of Washington. It is especially stipulated, however, that this transcript of proceedings in the Social Security Board need not be made a part of the printed record on appeal, but may be reproduced in the form of photostatic copies. It is further stipulated that the parties must otherwise comply with the rules of the United States Circuit Court of Appeals for the Ninth Circuit with reference to the preparation of record on appeal save [28] with respect to this particular transcript.

2. Plaintiff's Complaint filed with the Clerk of the United States District Court for the Eastern District of Washington on May 8, 1944.

3. Summons with attached copy of United States Post Office receipt for registered mail.

4. Defendant's Answer.

5. Defendant's Motion for Summary Judgment.

6. Notice of Amendment of Motion to Dismiss on Behalf of the United States of America.

7. Opinion of the Trial Court.

8. Plaintiff's Motion for Summary Judgment.

9. Judgment filed December 22, 1944.

10. Notice of Appeal.

11. Statement of the Points Upon Which Appellants Intend to Rely upon Appeal to the Circuit Court of Appeals for the Ninth Circuit.

12. Stipulation as to Record.

Dated this 1st day of March, 1945.

EDWARD M. CONNELLY
Attorney for Defendants
JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed March 1, 1945. [29]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 29 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the stipulation of counsel for appellant and appellee, as the same remain of record and on file in the office of the Clerk of the said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that in accordance with the stip-

ulation of counsel, I herewith enclose a photostatic copy of the Transcript of Proceedings before the Social Security Board of the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 6th day of March, 1945.

[Seal] A. A. LaFRAMBOISE
Clerk, U. S. District Court,
Eastern District of Washington. [30]

[Endorsed]—No. 10998. United States Circuit Court of Appeals for the Ninth Circuit. United States of America and the Social Security Board of the United States of America, Appellants, vs. Augusta J. LaLone, on behalf of Julie S. LaLone, Janet D. LaLone, Jill R. LaLone and Lance D. LaLone, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed March 8, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10998

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,
Appellants,

v.

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,
Appellees.

DESIGNATION OF POINTS UPON WHICH APPELLANTS WILL RELY UPON APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals, to the above-named appellees and to Justin C. Maloney, your attorney of record:

You and each of you will please take notice that the points upon which appellants will rely upon appeal are those points which appear in the Transcript of Record, heretofore served and filed, following service of Notice of Appeal in the above-entitled proceedings.

Dated at Spokane, Washington, this 13th day of March, 1945.

EDWARD M. CONNELLY
United States Attorney for the Eastern District of Washington, and Attorney for Appellants.

Service acknowledged by receipt of copy this 13th day of March, 1945.

JUSTIN C. MALONEY
Attorney for Appellees.

[Endorsed]: Filed March 15, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION TO RELIEVE PARTIES FROM PRINTING CERTAIN PORTIONS OF RECORD

Come now the parties above-named by their respective attorneys and stipulate and respectfully make application to the Court for relief from printing and producing the transcript of proceedings on hearing before the Social Security Board of the United States of America.

This application is made upon the ground that said transcript, in addition to the written reproduction of testimony in question and answer form, contains many documents, is a bulky and voluminous transcript and has already been filed in the Court and one copy furnished appellants' attorney, which he in turn made available to appellee's counsel pending arguments, and that counsel for both parties and the Clerk of the District Court are familiar with the transcript in its present form and that to disturb its present form by printing it in record form as required by the rules of Court for such records would tend to confusion and entail an unnecessary

and excessive expense which would serve no useful purpose either to this Court or to the counsel who will prepare briefs and arguments on appeal from said transcript.

EDWARD M. CONNELLY
Attorney for Appellants.
JUSTIN C. MALONEY
Attorney for Appellee.

So Ordered:

CURTIS D. WILBUR
Senior United States Circuit Judge.

[Endorsed]: Filed March 15, 1945. Paul P. O'Brien, Clerk.